No. 10-543

In the Supreme Court of the United States

THE CLEARING HOUSE ASSOCIATION, L.L.C.,
PETITIONER

v.

BLOOMBERG, L.P., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

MARK B. STERN
MATTHEW M. COLLETTE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Exemption 4 of the Freedom of Information Act authorizes the withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). In this case, the Board of Governors of the Federal Reserve System (Board) withheld the names, loan amounts, and loan dates of individual borrowers that requested loans from the discount window and Federal Reserve emergency lending facilities after concluding that release of such information would harm the competitive position of the borrowers and would impair the Board's future ability to maintain stability in financial markets. The questions presented are as follows:

1. Whether the court of appeals erred in holding that the information at issue was not "obtained from a person" within the meaning of Exemption 4 because the information resulted from the agency's own executive actions in granting the loans and thus was not obtained from the borrowers.

2. Whether the court of appeals erred in holding that the fact that disclosure of the information would harm the agency's ability to carry out its functions does not make the information "confidential" within the meaning of Exemption 4.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 10
Conclusion 18

TABLE OF AUTHORITIES

Cases:

Africa Fund v. *Mosbacher*, No. 92-CIV-289, 1993 WL 183736 (S.D.N.Y. May 26, 1993) 15

Board of Trade v. *CFTC*, 627 F.2d 392 (D.C. Cir. 1980) 11

Buffalo Evening News, Inc. v. *Small Bus. Admin.*, 666 F. Supp. 467 (W.D.N.Y. 1987) 12

Canadian Commercial Corp. v. *Department of the Air Force*, 514 F.3d 37 (D.C. Cir. 2008) 13

Clarke v. *United States Dep't of Treasury*, No. 84-1873, 1986 WL 1234 (E.D. Pa. Jan. 28, 1986) 12, 15

Comstock Int'l (U.S.A.), Inc. v. *Export-Import Bank*, 464 F. Supp. 804 (D.D.C. 1979) 12

Critical Mass Energy Project v. *NRC*, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 507 U.S. 984 (1993) . 14, 15

FBI v. *Abramson*, 456 U.S. 615 (1982) 13

Federal Open Mkt. Comm. of the Fed. Reserve Sys. v. *Merrill*, 443 U.S. 340 (1979) 7, 16

Freeman v. *Bureau of Land Mgmt.*, 526 F. Supp. 2d 1178 (D. Or. 2007) 12

Cases—Continued: Page

Inner City Press/Cmty. on the Move v. *Board of Governors*, 463 F.3d 239 (2d Cir. 2006) 7, 11, 13, 14
Judicial Watch, Inc. v. *Export-Import Bank*, 108 F. Supp. 2d 19 (D.D.C. 2000) 12, 15
McDonnell Douglas Corp. v. *NASA*, 180 F.3d 303 (D.C. Cir. 1999) 13
National Parks & Conservation Ass'n v. *Morton*, 498 F.2d 765 (D.C. Cir. 1974) 6, 14, 15
9 to 5 Org. for Women Office Workers v. *Board of Governors*, 721 F.2d 1 (1st Cir. 1983) 14, 16
Public Citizen Health Research Group v. *NIH*, 209 F. Supp. 2d 37 (D.D.C. 2002) 12

Statutes:

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 8
§ 1103(b), 124 Stat. 2118 9
§ 1103(b), 124 Stat. 2118-2119 10
§ 1103(b)(1)-(3), 124 Stat. 2118-2119 17
§ 1103(b), 124 Stat. 2119 10
§ 1103(b), 124 Stat. 2120 10
§ 1109(c), 124 Stat. 2129 ..... 8, 17
§ 1109(c)(1)-(5), 124 Stat. 2129 8
Federal Reserve Act, 12 U.S.C. 221 *et seq.* 2
12 U.S.C. 225a 2, 16
12 U.S.C. 248(j) 2
12 U.S.C. 301 2
12 U.S.C. 343 (§ 13(3)) 2, 8, 9, 17
12 U.S.C. 347b(a) (§ 10(B)) 2, 16

Statutes—Continued: Page

Freedom of Information Act, 5 U.S.C. 552 *et seq.* 4
5 U.S.C. 552(b)(4) 5, 11, 16
5 U.S.C. 552(b)(5) 5

In the Supreme Court of the United States

No. 10-543

THE CLEARING HOUSE ASSOCIATION, L.L.C.,
PETITIONER

v.

BLOOMBERG, L.P., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 601 F.3d 143. The opinion and order of the district court (Pet. App. 20a-60a) is reported at 649 F. Supp. 2d 262.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 2010. A petition for rehearing was denied on August 20, 2010 (Pet. App. 16a-19a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Reserve Act, 12 U.S.C. 221 *et seq.*, provides that the Board of Governors of the Federal Reserve System (Board), along with the Federal Open Market Committee, "shall maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates." 12 U.S.C. 225a. The Federal Reserve Act vests lending authority in the regional Federal Reserve Banks and the power to authorize and supervise lending in the Board. 12 U.S.C. 347b(a); see also 12 U.S.C. 301, 248(j), 343.

The discount window is a permanent lending program through which the twelve regional Federal Reserve Banks, subject to Board regulation and supervision, lend funds on a secured, short-term basis to eligible depository institutions in their districts. C.A. App. A67. In response to the recent financial crisis, the Board authorized the Reserve Banks to initiate a number of additional, temporary special credit and liquidity facilities to relieve severe liquidity strains on the market and reduce risks to financial stability. Specifically, in the latter part of 2007, the Board authorized the Reserve Banks, under Section 10B of the Federal Reserve Act, 12 U.S.C. 347b(a), to establish the Term Auction Facility, which provided longer than overnight funding to depository institutions with interest rates determined at auction. In early 2008, as financial market conditions continued to deteriorate, the Board authorized the Reserve Banks, under the emergency authority of Section 13(3) of the Federal Reserve Act, 12 U.S.C. 343, to initiate programs, including: the Primary Dealer Credit

Facility, under which the Federal Reserve Bank of New York made overnight funds available to "primary dealers"[1] that are not eligible to borrow at the discount window, and the Term Securities Lending Facility, which provided for 28-day loans of Treasury securities. C.A. App. A68-A70.

In the past, the Board and the Federal Reserve Banks have released extensive public information about lending made under such programs, including the terms of loans, eligibility requirements, current and historical lending data, and types and value of collateral accepted. C.A. App. A72-A73. That information, however, generally has been released in the aggregate for each Federal Reserve district and facility and has not been broken down by borrower or by specific loan. Thus, historically speaking, neither the Board nor the Reserve Banks have disclosed information regarding individual loans, such as the names of individual borrowers, or the amounts, dates, or specific collateral pledged for specific loans. *Id.* at A73.

The Board views such information as sensitive and confidential because Reserve Banks act as "lenders of last resort" to depository institutions and primary dealers unable to secure funding from market sources on a short-term basis. C.A. App. A74. Although healthy financial institutions also borrow from Reserve Banks for ordinary operational reasons, and to obtain liquidity in markets that are temporarily closed to participants, the Reserve Banks' role as lenders of last resort to institutions unable to secure short-term funds in the market

---

[1] Primary dealers are designated banks and securities brokers with which the Federal Reserve Bank of New York trades U.S. government securities as counterparties in executing open market operations. C.A. App. A86.

results in a stigma associated with borrowing from them. *Id.* at A74-A75. That stigma can cause significant competitive injury to financial institutions should information regarding individual loans become public. *Ibid.* Moreover, the Board has concluded that if depository institutions and primary dealers were unwilling to come to the Reserve Banks for their funding needs, particularly in times of economic crisis, the Board's ability to administer lending programs crucial to maintaining national financial and economic stability would be severely undermined. *Id.* at A79-A82.

2. On May 21, 2008, Bloomberg L.P. (a respondent in this Court) filed a request with the Board under the Freedom of Information Act (FOIA), 5 U.S.C. 552 *et seq.*, seeking information relating to the rates, terms, and collateral posted for individual loans made through the programs described above between April 4, 2008 and May 20, 2008. C.A. App. A50-A51. After providing several responsive records, the Board withheld approximately 231 pages of Remaining Term Reports (Reports) responsive to the request. The Reports are prepared by the staff of the Board's Division of Monetary Affairs using raw data provided by each Reserve Bank. The Reports show outstanding extensions of credit under the discount window and emergency lending programs. *Id.* at A38-A39. The Reports also contain the names of borrowers that requested loans, the originating Reserve Bank district, individual loan amounts, the type of lending program borrowed from, and loan origination and maturity dates. *Ibid.*

The Board withheld the Reports under FOIA Exemption 4, which exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

5 U.S.C. 552(b)(4).[2] The Board explained that disclosure of the Reports would reveal the identities of the institutions that sought funds from the Reserve Banks under "last resort" lending programs, and thus would likely cause substantial competitive injury to those institutions that provided the information at issue to the Reserve Banks. C.A. App. A57. In addition, the Board explained that the future reluctance of institutions to participate in such lending programs would impair the Board's ability to carry out statutory functions in a time of economic crisis. *Id.* at A57-A58.

3. On November 7, 2008, Bloomberg filed this FOIA action in federal district court. The district court granted partial summary judgment in favor of Bloomberg, rejecting the Board's Exemption 4 argument and ordering the release of the information at issue here. Pet. App. 20a-60a. The court held that with the exception of the borrowers' names, the Reports do not contain information "obtained from a person," reasoning that "[t]he fact that the [Reserve Banks] themselves generated the information contained in the Remaining Term Reports is sufficient to vitiate the applicability of Exemption 4." *Id.* at 48a-51a.

The district court further held that none of the information was "privileged or confidential," because in its view disclosure would neither impair the government's ability to obtain such information in the future nor cause substantial harm to the competitive position of the bor-

---

[2] The Board also invoked FOIA Exemption 5, which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). Because the Board did not rely on Exemption 5 after the district court proceedings, this brief does not discuss it further.

rowing institutions from which the information was obtained. See Pet. App. 51a-56a (citing *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765 (D.C. Cir. 1974)). The latter determination was based on the court's conclusion that disclosure would not affect the borrowers' competitive position because any harm would not be "from the affirmative use of the disclosed information *by their competitors*." *Id.* at 55a. Refusing to recognize a "program effectiveness" test, the court also rejected the Board's alternative argument that the commercial and financial information in the Reports is "privileged or confidential" because its release would substantially undermine the Board's ability to administer lending programs crucial to maintaining market stability. *Id.* at 52a-53a n.15.

4. The court of appeals affirmed. Pet. App. 1a-15a. The court first held that the individual loan information was not "obtained from a person" (*i.e.*, the borrowing institutions) as required by Exemption 4. The court acknowledged that a loan application would be "obtained from a person," but reasoned that "Bloomberg's FOIA request does not seek loan applications; it seeks documents that show what loans the Federal Reserve Banks actually made." *Id.* at 8a-9a. The court of appeals stated that "what is requested is not merely the information collected and slightly reprocessed by the government, but disclosure of the agency's own executive actions." *Id.* at 10a. The court explained that "even if the loans were granted automatically, they did not come into existence until the Federal Reserve Bank took executive action by granting the loan. The only information sought is a summary report of actions that were taken by the government. And it cannot be said that the gov-

ernment 'obtained' information as to its own acts and doings from external sources or persons." *Id.* at 12a.

The court of appeals also rejected the Board's alternative argument that the information on individual borrowers was protected under Exemption 4 because it was confidential commercial information obtained by the Board from the Reserve Banks. The court declined to decide whether the individual Reserve Banks that submitted the information to the Board are "persons" for purposes of Exemption 4. Pet. App. 12a n.2. Rather, the court held that the information was not "confidential." The court explained that information is confidential for purposes of Exemption 4 if its disclosure would have the effect of harming "the competitive position of the person from whom the information was obtained." *Id.* at 13a (quoting *Inner City Press/Cmty. on the Move* v. *Board of Governors*, 463 F.3d 239, 244 (2d Cir. 2006)). The court concluded that because the Board did not allege that the relevant "person" in this instance—the Reserve Bank itself—suffered any competitive harm, the information could not be deemed "confidential" under that test. *Ibid.*

The court of appeals then declined to "extend" the scope of Exemption 4's "confidential" requirement to cover information that, if disclosed, would harm the Board's ability to carry out its mission or undermine program effectiveness. Pet. App. 13a-14a. The court held that the "program effectiveness" test, previously endorsed by the First and D.C. Circuits, "would give impermissible deference to the agency, and would be analogous to the 'public interest' standard rejected by the Supreme Court in the context of Exemption Five." *Id.* at 14a (citing *Federal Open Mkt. Comm. of the Fed. Reserve Sys.* v. *Merrill*, 443 U.S. 340, 354 (1979)).

5. On May 3, 2010, the Board and intervenor Clearing House Association, L.L.C. (petitioner in this Court) filed petitions for rehearing en banc. The petitions challenged the panel's holding that the information at issue was not "obtained from a person," as well as its holding that a "program effectiveness" test for confidentiality is not cognizable under Exemption 4. The court of appeals denied the petitions on August 20, 2010. Pet. App. 16a-19a.

6. On July 21, 2010, while the petitions for rehearing were pending, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act), Pub. L. No. 111-203, 124 Stat. 1376, became law. The Dodd-Frank Act required the release of some of the information that had been withheld by the Board pursuant to Exemption 4 and also established prospective standards governing the disclosure (after specified intervals) of loan-related information of the type at issue in this case.

a. Section 1109(c) of the Dodd-Frank Act required the Board to "publish on its website, not later than December 1, 2010," certain information concerning emergency lending facilities authorized by Section 13(3) of the Federal Reserve Act from December 1, 2007 through July 21, 2010. § 1109(c), 124 Stat. 2129. Those facilities include three of the facilities at issue in this case: the Term Auction Facility, the Primary Dealer Credit Facility, and the Term Securities Lending Facility (see pp. 2-3, *supra*). Under the Act, the Board must disclose: (1) the names of recipients of assistance; (2) the type of assistance provided; (3) the value or amount of assistance; (4) the dates; and (5) the specific terms of any repayment expected, including interest rate and collateral. § 1109(c)(1)-(5), 124 Stat. 2129. Consistent with its obligation under the Act, the Board disclosed

that information on December 1, 2010. As a result of the Board's recent disclosure, the part of the FOIA request pertaining to the emergency lending facilities has been rendered moot. The only information remaining at issue in this case concerns lending from the discount window.

b. Section 1103 of the Dodd-Frank Act establishes prospective standards for the protection and subsequent release of information concerning lending under both the discount window and emergency lending programs. Those prospective standards apply to "information concerning the borrowers and counterparties participating in emergency credit facilities, discount window lending programs, and open market operations authorized or conducted by the Board or a Federal reserve bank." § 1103(b), 124 Stat. 2118. For transactions executed after its effective date (July 21, 2010), the Act sets a schedule of delayed disclosure of (1) "the names and identifying details of each borrower, participant, or counterparty"; (2) "the amount borrowed"; (3) "the interest rate or discount paid"; and (4) "information identifying the types and amounts of collateral pledged." *Ibid.*

The Dodd-Frank Act does not, however, require immediate release of such information. For emergency lending facilities created under Section 13(3) of the Federal Reserve Act, the information must be released one year after the effective date of termination of the authorization of the facility. § 1103(b), 124 Stat. 2118. With respect to discount window and open market operations, the information must be released by "the last day of the eighth calendar quarter following the calendar quarter in which the covered transaction was conducted." *Ibid.* The Chairman of the Board may publicly release this information earlier if he determines that such disclosure

would be in the public interest and would not harm the effectiveness of the relevant credit facility. § 1103(b), 124 Stat. 2118-2119. For all of the loans subject to this section, the information "shall be confidential," including for purposes of FOIA, until the mandatory release date (unless the Chairman determines to release it earlier). § 1103(b), 124 Stat. 2119.

As noted above, the new standards set forth in Section 1103 operate only on a prospective basis. Section 1103(b) provides that "[n]othing in this section is meant to affect any pending litigation or lawsuit filed under [FOIA] on or before the date of enactment [of the Act]." 124 Stat. 2120.

ARGUMENT

The court of appeals erred in rejecting the applicability of Exemption 4 in two respects: (1) in holding that transaction details such as the names of borrowers, loan amounts, and maturity dates were not "obtained from" the borrowers because they reflect "the agency's own executive actions" (Pet. App. 10a); and (2) in holding, contrary to decisions of the First and D.C. Circuits, that harm to the agency's ability to carry out its functions if the information is released does not make the information "confidential" (*id.* at 13a-14a). Notwithstanding those errors, this Court's review is not warranted here. As a result of the enactment of the Dodd-Frank Act, the Board recently has disclosed some of the information sought by the FOIA request regarding the emergency lending programs (*i.e.*, the special facilities other than the discount window). Moreover, while the case is not moot in light of the remaining discount-window information from 2008, the court of appeals' decision will not affect future requests for information concerning the

discount window and emergency lending programs. That is because the Dodd-Frank Act sets prospective standards governing the release of that information after specified periods of time. The questions presented thus will not arise again in this context.

1. FOIA Exemption 4 authorizes the withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). The court of appeals imparted an unduly narrow reading of Exemption 4 in applying that provision to the circumstances of this case.

a. The court of appeals erred in holding that none of the information at issue had been "obtained from a person," *i.e.*, the borrowing institutions. It is uncontested that the borrowing institutions are "persons" for purposes of Exemption 4. Pet. App. 8a. And, as the district court recognized (*id.* at 49a), it cannot reasonably be disputed that the Reserve Banks obtained at least the names of the borrowers from the borrowers themselves. The court of appeals' categorical approach, however, does not acknowledge even that the borrowers' names were "obtained from a person" within the meaning of Exemption 4.[3]

---

[3] While a company's identity may not normally be considered "privileged or confidential," its identity on a list of borrowers at the discount window is confidential because it reveals confidential information about the company—that it applied for a discount window loan. See, *e.g.*, *Board of Trade* v. *CFTC*, 627 F.2d 392, 402-403 (D.C. Cir. 1980) (names of trade sources can be protected under Exemption 4 if revealing them in context would reveal confidential commercial information); *Inner City Press/Cmty. on the Move* v. *Board of Governors*, 463 F.3d 239, 244 (2d Cir. 2006) (recognizing that company names on a list of subprime lenders is "commercial or financial" in character). In any event, the court of appeals did not reach this issue.

The decision of the court of appeals rests on the mistaken premise that information provided to the government ceases to be information "obtained from a person" if that information is reflected in the "agency's own executive actions." Pet. App. 10a. Other courts have not taken that position, and several district court decisions have held that information similar to the identifying information at issue here was "obtained from a person" within the meaning of Exemption 4. See *Clarke* v. *United States Dep't of Treasury*, No. 84-1873, 1986 WL 1234, at *2 (E.D. Pa. Jan. 28, 1986) (transaction details for government sale of a type of U.S. Treasury bond consists of information "obtained from persons outside the government"); *Public Citizen Health Research Group* v. *NIH*, 209 F. Supp. 2d 37, 44 (D.D.C. 2002) (information about royalty revenues received by NIH from licensing agreements negotiated with outside parties deemed to be "obtained from a person"); *Judicial Watch, Inc.* v. *Export-Import Bank*, 108 F. Supp. 2d 19, 28 (D.D.C. 2000) (information pertaining to application for and grant of export insurance by government bank constitutes information "obtained from a person"); *Comstock Int'l (U.S.A.), Inc.* v. *Export-Import Bank*, 464 F. Supp. 804, 807 (D.D.C. 1979) (protecting under Exemption 4 a loan agreement between third party and government bank); *Freeman* v. *Bureau of Land Mgmt.*, 526 F. Supp. 2d 1178, 1188 (D. Or. 2007) (government data not outside Exemption 4 where it "piggybacks" on data obtained from private party); but see *Buffalo Evening News, Inc.* v. *Small Bus. Admin.*, 666 F. Supp. 467 (W.D.N.Y. 1987) (declining Exemption 4 protection because loan information at issue was "generated by the [Small Business Administration] in the course of its involvement with its borrowers"). Similarly, albeit with-

out addressing the "obtained from a person" requirement, the D.C. Circuit has applied Exemption 4 to line-item pricing in government contracts even though the prices resulted in part from government action. See, *e.g.*, *Canadian Commercial Corp.* v. *Department of the Air Force*, 514 F.3d 37, 40-41 (2008); *McDonnell Douglas Corp.* v. *NASA*, 180 F.3d 303, 304 (1999).

The court of appeals nevertheless found the Reserve Banks' grant of the loans to be talismanic, so as to take the information outside the scope of Exemption 4. See Pet. App. 12a ("[E]ven if the loans were granted automatically, they did not come into existence until the Federal Reserve Bank took executive action by granting the loan."). But that ignores the crucial fact that the information sought by Bloomberg is essentially the same as that provided by the borrowers. At the very least, the information supplied by the borrowers in their loan applications is inextricably intertwined with the information sought by Bloomberg regarding the ultimate loan terms. And because disclosure of information about the loan terms would tend to identify the borrowers, it is also inextricably intertwined with the names of the borrowers themselves (which, as noted above, are plainly "obtained from" the borrowers alone). Because it is well established under FOIA that non-exempt information "inextricably intertwined" with exempt information is protected from disclosure, that provides another basis for the government to withhold the information at issue. *E.g.*, *Inner City Press*, 463 F.3d at 249 n.10; see 5 U.S.C. 552(b) (requiring release of any "reasonably segregable" non-exempt information "after deletion of the portions which are exempt"); cf. *FBI* v. *Abramson*, 456 U.S. 615, 625 (1982) (conferring protection from disclosure under FOIA "that part of an otherwise non-exempt compilation

which essentially reproduces and is substantially the equivalent of all or part of an earlier [exempt] record").

b. The court of appeals—after assuming that the information was "obtained from" the Reserve Banks and that a Reserve Bank is a "person," Pet. App. 12a & n.2—erred in holding that the information was not "confidential" for purposes of Exemption 4. In *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765 (1974), the D.C. Circuit stated information is "confidential" if its disclosure would either (1) "impair the Government's ability to obtain necessary information in the future"; or (2) "cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* at 770. The Second Circuit had adopted that formulation previously, and the court of appeals relied on it in this case. See Pet. App. 13a (citing *Inner City Press*, 463 F.3d at 244).[4]

As the D.C. Circuit itself has made clear, however, "the two interests identified in the *National Parks* test are not exclusive." *Critical Mass Energy Project* v. *NRC*, 975 F.2d 871, 879 (1992) (en banc), cert. denied, 507 U.S. 984 (1993); cf. *National Parks*, 498 F.2d at 770 n.17 (expressing "no opinion as to whether other governmental interests are embodied" in Exemption 4, such as "program effectiveness"). The D.C. Circuit subsequently cited with approval "the First Circuit's conclusion" in *9 to 5 Organization for Women Office Workers* v. *Board of Governors*, 721 F.2d 1, 11 (1983), "that the exemption also protects a governmental interest in ad-

---

[4] The Board did not argue that the information satisfied the first prong of the *National Parks* test, and the court of appeals found that it did not satisfy the second prong because the Board did not allege any competitive harm to the Reserve Banks themselves (as opposed to the borrowing institutions). Pet. App. 13a.

ministrative efficiency and effectiveness." *Critical Mass Energy Project*, 975 F.2d at 879.

The Second Circuit did not question the Board's showing, "plausible, and forcefully made" (Pet. App. 15a), that requiring disclosure of the information here would significantly impair the Board's future ability to use discount window and emergency lending programs to control short-term interest rates, provide much needed liquidity, and maintain market stability. The court nevertheless concluded that such harm is not relevant to assessing the confidentiality of the information because Exemption 4 does not "encompass the so-called 'program effectiveness' test." *Id.* at 13a.

The court of appeals appears to have misunderstood the nature of the "program effectiveness" standard. As various district courts have recognized, the purposes underlying Exemption 4 are furthered through the "program effectiveness" standard by protecting sensitive commercial or financial information about participants in government loan, grant, and licensing-type programs where disclosure would demonstrably undermine the basic objectives of those programs. See, *e.g.*, *Judicial Watch, Inc.*, 108 F. Supp. 2d at 30 (interest in promoting government's provision of export insurance); *Africa Fund* v. *Mosbacher*, No. 92-CIV-289, 1993 WL 183736, at *7 (S.D.N.Y. May 26, 1993) (interest in promoting export control system); *Clarke*, 1986 WL 1234, at *2-*3 (interest in promoting purchase of U.S. securities). That is because Exemption 4 is intended both "for the benefit of persons who supply information" *and* for the benefit of "the agencies which gather it." *National Parks*, 498 F.2d at 770.

The court of appeals mistakenly concluded that the program effectiveness test was the "functional equiva-

lent" of the "public interest" standard for withholding under Exemption 5, which this Court rejected in *Federal Open Market Committee of Federal Reserve System* v. *Merrill*, 443 U.S. 340, 354 (1979). Pet. App. 15a. The court of appeals believed that the standard rejected in *Merrill* would have permitted an agency to withhold "any memoranda * * * whenever the agency concluded that disclosure would not promote the 'efficiency' of its operations or otherwise would not be in the 'public interest.'" *Ibid.* The program effectiveness test under Exemption 4, however, creates no such unfettered discretion to withhold information. The test is far more limited: it applies only to "trade secrets and commercial or financial information" "obtained from a person," 5 U.S.C. 552(b)(4), and not to "any memoranda" as in *Merrill*. The standard therefore applies only in the commercial or financial context, and requires evidence identifying the "particular interest" involved and showing "how that interest will be harmed by public disclosure of the specific information which has been requested." *9 to 5*, 721 F.2d at 10.

The Board made that showing here. Unrebutted record evidence shows that, because of the stigma associated with use of the discount window and the emergency lending facilities, institutions will be deterred from borrowing from the Reserve Banks if their identities are made publicly available—even if the institution is not facing financial problems. The lack of willing borrowers would in turn significantly impair the Board's ability to use such lending facilities to achieve its statutory monetary policy mandates: "to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates," 12 U.S.C. 225a; to provide liquidity to depository institutions, 12 U.S.C. 347b(a);

and to provide emergency liquidity to individuals, partnerships, and corporations in "unusual and exigent circumstances," 12 U.S.C. 343. C.A. App. 79-82. Contrary to the decision below, such consequences should bear on the Exemption 4 analysis.

2. Notwithstanding the court of appeals' errors, this case does not warrant further review. Through the intervening enactment of the Dodd-Frank Act, Congress has resolved the question of whether and when the type of information at issue in this case must be disclosed on a forward-going basis, for post-enactment loans.

On December 1, 2010, pursuant to the Dodd-Frank Act (§1109(c), 124 Stat. 2129), the Board released some of the very information—the pre-enactment Section 13(3) loan information—sought in this litigation. Although the case is not moot because the Dodd-Frank Act does not apply to the remaining pre-enactment discount-window information at issue, the Act's prospective standards ensure that the specific issue will not recur for post-enactment loans covered by the Act. For transactions occurring after July 21, 2010, the Dodd-Frank Act resolves any question about the application of FOIA to information related to loans from both the discount window and Section 13(3) emergency lending programs. Congress struck a balance between the government's interest in preserving the confidentiality of the Board's discount- window and emergency-loan related information and the public interest in disclosure of such information. The Act protects such information from disclosure under FOIA for a set period of time (one or two years), after which point the information must be released. § 1103(b)(1)-(3), 124 Stat. 2118-2119; see pp. 8-10, *supra*. The Act governs precisely the type of information sought in this case. That means any holding as

to Exemption 4's applicability to this information will have no impact on future FOIA requests for such information.

To be sure, the government does not intend to suggest that the questions presented are unimportant or that they would not warrant this Court's review in an appropriate case. If, as petitioner posits (Pet. 26-27), the decision of the court of appeals is followed by other courts or applied in other contexts in a way that impairs the operation of other agency programs, this Court could consider whether to grant review in a future case and correct the court of appeals' errors at that time. In light of the Dodd-Frank Act, however, this case is not an appropriate vehicle in which to do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
MARK B. STERN
MATTHEW M. COLLETTE
Attorneys

FEBRUARY 2011